STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DAVID MOREDA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 06-2837
	)	
HILLSBOROUGH COUNTY,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A final hearing was held in this case on October 25 and 26, 2006, in Tampa, Florida, before Carolyn S. Holifield, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Danielle R. Green, Esquire
Stephen M. Todd, Esquire
Hillsborough County Attorney
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Tampa, Florida 33601

For Respondent: Monica L. Strickland, Esquire
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STATEMENT OF THE ISSUES

The issues for determination are: (1) whether Hillsborough County took any adverse employment action against Petitioner, David Moreda; (2) whether Petitioner disclosed information in

the nature specified under Subsection 112.3187(5), Florida Statutes (2006); (3) if yes to the foregoing, whether such adverse employment action against Petitioner was causally related to any disclosure Petitioner made of information specified in Subsection 112.3187(5), Florida Statutes (2006); (4) whether Petitioner provided above-referenced information to Respondent's chief executive officer; and (5) whether Petitioner timely filed a complaint of whistle-blower retaliation.

PRELIMINARY STATEMENT

By letter to Respondent, Hillsborough County (Hillsborough County or the County), dated July 14, 2006, Petitioner, David Moreda (Petitioner), requested a formal administrative hearing before the Division of Administrative Hearing (DOAH). The request alleged that Petitioner was a whistle-blower who was retaliated against by the County. On August 8, 2006, Hillsborough County referred the matter to DOAH for assignment of an Administrative Law Judge to conduct the formal hearing.

Prior to hearing, the parties filed a Joint Pre-Hearing Stipulation in which they stipulated to facts that required no proof at hearing.

At hearing, Petitioner testified on his own behalf and presented the testimony of five witnesses: George Hahn, Lori Krieck, John Wever, Robert Sheehan, and Richard Kirby, IV. Also, Petitioner presented the post-hearing deposition testimony

of William Schill. Hillsborough County presented the testimony of nine witnesses: Jodi Prieto; Robert Williams, Jr.; Joyce Provenzano; Dennis Cofield; Dr. Carlos Fernandes; Robert Gordon; Paul Vanderploog; Jack Carlisle, Jr.; and Wanda Dunnigan. The parties stipulated to Joint Exhibits 1 through 45, all of which were admitted into evidence. Joint Exhibit 45 is the deposition testimony of Scott Cottrell. Petitioner's Exhibit 1 was also admitted into evidence.

At the conclusion of the hearing, Petitioner requested that the record be left open to allow her to take and file the deposition of William Schill, a witness who was unavailable on the dates of the hearing. The undersigned granted that unopposed request, and the record remained open until December 12, 2006, when the deposition Transcript of Mr. Schill was filed.

The three-volume Transcript of the hearing was filed on November 17, 2006. Petitioner and Respondent filed Proposed Findings of Fact and Proposed Conclusions of Law on December 22, 2006. The post-hearing submittals have been carefully considered in preparation of this Recommended Order.

FINDINGS OF FACT

1. The County administrator, Patricia G. Bean, is the head of the Hillsborough County administrative organization and the chief executive officer of Hillsborough County. As County administrator, Ms. Bean is responsible for carrying out all decisions, policies, ordinances, and motions made by the Board of County Commissioners. She is also responsible for oversight of all the departments under the County Administrator's Office and uses approximately 24 departments within the Hillsborough County organization to achieve the functions necessary to County government.

2. The Public Works Department (Public Works) and the Water Resource Services Department (Water Resource Services), formerly referred to as the Water Department, are each stand-alone departments. Most of the functions of Public Works and Water Resource Services are separate and distinct from each other.

3. From approximately March 1986 through May 2006, Hillsborough County employed Petitioner in Water Resource Services.

4. Petitioner began working for Hillsborough County as a senior groundskeeper. Thereafter, he became a landscape gardener, which involved cutting grass and maintaining wastewater facilities. Petitioner ultimately became a Plant

Maintenance Mechanic I and then a Plant Maintenance Mechanic II. As a Plant Maintenance Mechanic II, Petitioner's duties were to operate and maintain lift stations for Water Resource Services.

5. As of October 2003, Petitioner was employed as a Plant Maintenance Mechanic II and was assigned to work at the County's South Pump Station.

6. In or about October 2003, Petitioner was injured in a nonwork-related motorcycle accident which resulted in Petitioner's breaking both of his feet. As a result of his injuries, Petitioner requested and the County granted a medical leave of absence.

7. Petitioner tried to return to work in April 2004, but it was too soon after his motorcycle accident. After Petitioner's attempt to return to work was unsuccessful, and apparently premature, his doctor placed him on another medical leave.

8. Initially, Petitioner was on short-term medical leave for about six months, followed by a long-term disability leave for the next year or so. Hillsborough County preserved Petitioner's employment status while he was on these leaves of absence necessitated by injuries he sustained in the motorcycle accident.

9. Some time prior to January 2005, in anticipation of returning to work, Petitioner applied for a transportation worker position in Public Works.

10. In March 2005, the County sent Petitioner to have a doctor complete a "Fitness for Duty Report" form. Petitioner went to his orthopedic surgeon, who completed the form on March 16, 2005. The doctor noted on the form that Petitioner could return to work on April 4, 2005.

11. As he prepared to return to work after his one and one-half years of medical leave, Petitioner began to request work location transfers. Petitioner requested three such transfers within Water Resource Services, where he was employed. Two of the three work location transfers were granted. In the instance when Petitioner's work location transfer was not granted, Petitioner was allowed to transfer to another work team at his assigned work site.

12. On January 24, 2005, while still on leave of absence, Petitioner requested a transfer of work location from the County's South Pump Station, where he was assigned before he went on medical leave, to the Central Pump Station. According to Petitioner, he requested this transfer because the Central Pump Station was closer to his home. The director of Water Resource Services, Paul Vanderploog, granted Petitioner's request.

13. By letter dated March 29, 2005, about two months after Petitioner's first request for transfer of work location was granted, and while he was still on leave, Petitioner requested another transfer. This time Petitioner requested to be transferred from the County's Central Pump Station to the Northwest Pump Station.[1/] When Petitioner requested a transfer from the Central Pump Station to the Northwest Pump Station, he told Vanderploog that if this request were honored, he (Petitioner) would not request another transfer. Petitioner specifically asked to be placed under either Wally Peters or Charlton Johnson, both of whom were team leaders at the Northwest Pump Station.

14. In addition to requesting the transfer from the Central Pump Station, Petitioner advised Mr. Vanderploog that he was looking for another position in the County and had been looking for the past six months.

15. Petitioner's March 29, 2005, letter stated, in part, the following:

> I pledge to you, right now, that I will return to full-duty under either Wally Peters or Charlton Johnson with NO other requests for movement. I promise you, as a gentleman, that I will accept the assignment at NW [Northwest] pump stations [sic] with no subsequent requests for lateral movement contingent upon my return. However, I will be looking for another position in the County, as I have done for the past 6+ months. I want to do something different

> with my life, and until the right opportunity comes along, I will "stick it out" in pump stations.

16. Vanderploog granted Petitioner's second transfer request and transferred Petitioner from the Central Pump Station to the Northwest Pump Station.

17. On April 4, 2005, the day Petitioner's physician had stated Petitioner could return to work, Petitioner was scheduled to begin work at the Northwest Pump Station. However, Petitioner called in sick that day and did not report to work.

18. When Petitioner returned to work, he reported to the Northwest Pump Station and worked there about two weeks. Meanwhile, on or about April 6, 2005, two days after he was to report to work, Petitioner requested a third transfer of work location. This time he wanted to be transferred from the Northwest Pump Station to the South Pump Station, where he was initially assigned. According to Petitioner, he requested the transfer from the Northwest Pump Station because he was not comfortable working on the team lead by Charlton Johnson, to which Petitioner had been assigned.

19. Mr. Vanderploog denied Petitioner's request to transfer from the Northwest Pump Station to the South Pump Station. The reason Mr. Vanderploog denied the request was that he knew Petitioner and the team chief at the South Pump Station had communication problems and did not get along very well.

Petitioner had detailed his perception of these problems in his March 29, 2005, letter to Mr. Vanderploog, referred to in paragraph 13 and 15 above. Mr. Vanderploog believed that if he transferred Petitioner back to the South Pump Station, the team chief with whom Petitioner did not get along, may have left that location, and he (Vanderploog) did not consider this an acceptable tradeoff.

20. Less than two weeks after Petitioner requested his third transfer (from the Northwest Pump Station to the South Pump Station) and Mr. Vanderploog denied the request, Petitioner wrote and sent an e-mail dated April 17, 2005, to the County administrator, Ms. Bean, and other upper management.

21. In the April 17, 2005, e-mail, Petitioner stated that he believed it was inappropriate to employ Synrick Dorsett, a sexual predator, in Water Resource Services in an unsupervised capacity. Specifically, Petitioner stated:

> The problem is that an employee of the Water Department, who is a registered sexual predator, is allowed to roam unsupervised through out [sic] Brandon and Valrico (and anywhere he cares to go) as part of his job assignment in the Water Department. His name is Syndrick Dorsett. . . He is on FDLE's website as a sexual predator. He should NOT be allowed to roam freely in a County vehicle.

22. At the time Petitioner wrote the e-mail to the County administrator, he had already known for ten years that there was

a sexual predator working in Water Resource Services. In fact, Synrick Dorsett's status as a sex offender was well known in Water Resource Services for many years.

23. Petitioner testified that he wrote the April 17, 2005, e-mail, after he "had certain thoughts" about another County employee named Synrick Dorsett. Petitioner testified that he began to have these thoughts after the County Commissioners proposed putting photos of sexual predators in County parks. Petitioner claimed that Dorsett came to mind in light of those proposals, because he was under the impression that Dorsett was a "sexual predator" and was a County employee as of April 2005. However, this testimony is not credible in light of Petitioner's admission to a County investigator.

24. In the summer of 2005, Petitioner admitted to the County, through Bob Sheehan, the chief investigator of the County's Professional Responsibility Section of the Consumer Protection and Professional Responsibility Agency, that he sent the April 17, 2005, e-mail to the County officials in order to better his leverage to obtain the position he wanted in Water Resource Services.

25. In fact, about two weeks after Petitioner sent the April 17 e-mail, even though Mr. Vanderploog had denied Petitioner's third work location request (from the Northwest Pump Station to the South Pump Station), Vanderploog attempted

to address Petitioner's concern that he (Petitioner) was uncomfortable working on the team to which he was assigned. In order to accommodate Petitioner, on or about May 2, 2005, Mr. Vanderploog moved Petitioner from the work team that he was initially assigned at the Northwest Pump Station to the other work team at that location.

26. In or about April 2005, Petitioner interviewed with Public Works for a position as a transportation worker, the position he had applied for several months earlier.

27. Prior to accepting the transportation worker position in Public Works, Petitioner indicated by his signature on two different County forms that he understood the job description for the position and could perform the functions of the job. Petitioner signed the County's pre-printed job description form on April 21, 2005, indicating that he read and understood the basic job description. A few days later, on May 2, 2005, Petitioner signed an Acknowledgement of Position Description Review form, in which he acknowledged that he "is able to perform the function" of the transportation worker without accommodations.

28. On or about May 4, 2005, Petitioner accepted the position of transportation worker with Public Works. On a County form, Petitioner acknowledged that he understood that his new position with Public Works, county-wide, is a voluntary

demotion (in terms of the hourly pay rate) and that if he did not successfully complete the six-month probationary period, he would no longer be employed by Hillsborough County.

29. Petitioner was scheduled to start his new position as transportation worker on May 23, 2005.

30. As noted above, Petitioner notified Mr. Vanderploog in the March 29, 2005, letter that he was looking for another position with the County. However, Petitioner never notified any manager in Water Resource Services that he had accepted the transportation worker position in Public Works. Water Resource Services first learned that Petitioner had accepted the position of transportation worker on or about May 10, 2005, when Public Works contacted the interim section manager (section manager) of Water Resource Services' wastewater operations and requested that his office complete a change of status form for Petitioner.

31. After learning from Public Works that Petitioner had accepted the transportation worker position, the section manager wrote an e-mail to Petitioner. In the e-mail, the section manger told Petitioner that he had been notified that Petitioner had accepted the transportation worker position and, therefore, Petitioner needed to resign from his current position as Plant Maintenance Mechanic II. The resignation was necessary in order to process the paperwork to effectuate Petitioner's move to his new position as transportation worker.

32. Prior to learning that Petitioner had accepted the position with Public Works, the section manager was concerned that Petitioner had only worked one day after he received medical clearance to return to work. In light of this concern, the section manager had instructed Petitioner's supervisor to initiate a written reprimand for Petitioner's failure to come to work. However, after receiving notice from Public Works that Petitioner had accepted a job in that unit, the section manager decided he would not pursue the previously-planned disciplinary action. Petitioner was aware of the contemplated disciplinary action. However, in the e-mail referred to in paragraph 31, in which he asked Petitioner to submit a resignation letter, the section manager also advised Petitioner that he (the section manager) would not pursue any disciplinary action against Petitioner since Petitioner was leaving Water Resource Services and taking another job.

33. On May 10, 2005, Petitioner voluntarily resigned from his position in Water Resource Services, after he received the e-mail from the section manager and after he had accepted the position as a transportation worker in Public Works.

34. Before starting his new job with Public Works in May 23, 2005, Petitioner asked Water Resource Services to rescind his resignation. Water Resource Services declined Petitioner's request because of his refusal to show up for work

and his behavior toward, and inability to appropriately interact with, people in the entire department.

35. After arriving at the job site in Public Works on his first day of work as a transportation worker, Petitioner testified that he knew that taking this job was a mistake. His first assignment involved installing a guardrail, work which was very labor intensive. Petitioner believed that the physical requirements of this job could result in his re-injuring himself. Given his concerns, Petitioner did not work the entire day and left after only a few hours and never returned.

36. After his first and only day working as a transportation worker, Petitioner indicated he could not perform the duties of that job. Thereafter, Public Works temporarily assigned Petitioner to the storm water unit in the County Center, where he performed duties such as filing, making copies, and "running" mail. He worked in this temporary assignment four or five months, including the summer of 2005.

37. The County scheduled a Fitness-for-Duty examination for Petitioner that occurred on June 16, 2005. The health care professional who conducted the examination concluded Petitioner must observe a lifting restriction and must walk only on even ground; he could not walk on rough, uneven terrain. The health care provider also indicated that Petitioner's physical

condition that required these restrictions was a permanent condition.

38. On August 8, 2005, Petitioner signed a County form, indicating that he could not perform any of the functions of a transportation worker.

39. A Fitness-for Duty meeting was conducted on August 11, 2005. During that meeting, Public Works reviewed all information regarding Petitioner's physical capabilities and the job tasks associated with the transportation worker position and other positions to which he requested a transfer, Plant Maintenance Mechanic I or II in the Storm Water section of Public Works. Public Works, in conjunction with the Human Resources Department, determined that Petitioner could not perform the essential functions of the transportation worker position or the Plant Maintenance Mechanic I and/or II positions.

40. Given the outcome of the Fitness-for-Duty meeting, by letter dated August 23, 2005, the County notified Petitioner that he had 90 days from the date of the letter to find another position or Public Works would have to terminate his employment.[2/] As the 90-day deadline was about to expire, Public Works determined that it needed to have a due process hearing on Petitioner's employment status. The time required for culmination of the hearing process resulted in the 90-day period

Petitioner was given to find a job being extended by more than two additional months.

41. On or about August 26, 2005, Petitioner began an approved leave of absence in conjunction with his search for another position.

42. After Petitioner sent the e-mail discussed in paragraph 31, Petitioner was invited to interview for four positions with the County, including positions in the Library Services Department, Public Works, and the Parks, Recreation and Conservation Department.

43. On or about October 20, 2005, Petitioner was interviewed for a position with the Library Services Department. However, he was not selected for that position because that position required that the person be bilingual, and Petitioner was not bilingual.

44. The Parks, Recreation and Conservation Department attempted to interview Petitioner on two different occasions. In the first instance, Petitioner failed to show up for an interview scheduled for August 4, 2005, at a time agreed upon by Petitioner. On or about November 19, 2005, Petitioner declined an interview for a second position with the Parks, Recreation and Conservation Department because the salary was too low.

45. On or about November 23, 2005, Public Works requested an extension of Petitioner's leave of absence. The Hillsborough County Civil Service Board (the Board) approved the extension.

46. In December 2005, Petitioner was interviewed for one of three vacant positions as an inspector/spray/equipment operator in the Mosquito and Aquatic Weed Control Section of Public Works. That position required some degree of expertise in spraying for mosquitoes and handling chemicals used for controlling pests on grass. Most of the interview questions were designed to determine the interviewee's level of technical knowledge about the required job duties. Petitioner's score on the interview rating was lower than any of the other candidates. Therefore, the more qualified applicants were offered the positions.

47. In a memorandum dated December 7, 2005, Scott Cottrell, P.E., engineering director, Public Works, requested a due process hearing for the purpose of seeking to terminate Petitioner from the transportation worker position.

48. Mr. Cottrell cited the following reasons for seeking this action: (1) Petitioner's last active day of work was August 25, 2005, and he had been on medical leave since August 26, 2005; (2) at the interviews for the transportation worker position, Petitioner had read and signed a Job Description form and indicated he understood the duties of that

position; (3) after reporting to work the first day, Petitioner advised the unit that he could not finish the day's work activities due to his physical condition; (4) Petitioner had worked only part of one day as a transportation worker; (5) the determination at the August 11, 2005, Fitness-for-Duty meeting that Petitioner was unable to perform the essential functions of his position as transportation worker; and (6) the determination that Petitioner could not perform the duties of Plant Maintenance Mechanic I or II positions in the Stormwater Section of Public Works due to his medical restrictions. The memo randomly noted that Petitioner had been given 90 days to seek and secure other employment, but had been unable to do so. Finally, Mr. Cottrell wanted to fill the position with someone who could perform the job. According to Mr. Cottrell, "[d]ue to our [Public Works] mission, it is imperative that we keep our positions actively filled; therefore, it has become necessary to proceed with further action to seek the termination of [Petitioner]."

49. On or about February 1, 2006, the Appointing Authority conducted a due process hearing regarding Petitioner's employment.

50. On February 10, 2006, Hillsborough County dismissed Petitioner from his position with Public Works. The notice of dismissal stated that Petitioner's dismissal was based on a

determination at a Fitness-for-Duty meeting on August 11, 2005, where it had been determined that Petitioner was unable to perform the essential functions of the transportation worker position for Public Works. The notice stated that the dismissal was based on Civil Service Board Rule 11.2(27).

51. Civil Service Board Rule 11.2(27) provides that an employee in the classified service, such as Petitioner, may be dismissed where the employee demonstrates a mental or physical impairment that prevents such employee, with or without accommodation, from performing the essential functions of his or her position.

52. The notice of dismissal dated February 10, 2006, specified that the dismissal was effective on that date. The notice also advised Petitioner that he could appeal the dismissal to the Board by filing a request for hearing within ten calendar days from the date of receipt of the notice.

53. Petitioner challenged his dismissal and filed an appeal request on February 20, 2006. On the appeal request form, Petitioner indicated that he received the notice of dismissal on February 13, 2006.

54. On June 5, 2006, the Board heard Petitioner's appeal of his dismissal. During this proceeding, at which both parties were represented by counsel, the Board considered the County's

Motion for Summary Judgment, the opposition thereto, exhibits in the record, and argument of counsel.

55. On June 20, 2006, the Board entered a Final Summary Judgment in the case affirming Petitioner's dismissal, after finding certain material facts to be undisputed. Among the undisputed material findings was Petitioner's admission at the February 1, 2005, due process hearing, that he could not perform the duties of transportation worker.[3/]

56. On or about July 10, 2006, Petitioner sent a memorandum to Camille Blake, the County's Equal Employment Opportunity manager, and Robert Sheehan requesting an investigation. In the memorandum, Petitioner alleged that Water Resource Services harassed and retaliated against him for reporting and exposing to the media "a register [sic] sexual predator on the payroll." According to the memorandum, Petitioner began looking for another position in the County as a result of the alleged harassment and retaliation, and this job search resulted in Petitioner's being offered and accepting the job in Public Works.

57. Petitioner's statement in the July 10, 2006, memorandum, that he began looking for a job because he was being harassed and retaliated against by persons in Water Resource Services is not credible contrary to Petitioner's March 29, 2005, letter to Mr. Vanderploog. In that letter, Petitioner

stated he had been looking for another position in the County for the "past 6+ months," because he "want[ed] to do something different with [his] life." Based on the foregoing, Petitioner returned to work in April 2005 and took the transportation worker position, not because he was being harassed or retaliated against, but because he wanted to do "something different with [his] life."

58. In the July 10, 2006, memorandum, Petitioner also stated that although he accepted the job in Public Works, he really wanted to stay in Water Resource Services so he did not immediately submit his resignation. In fact, Petitioner stated that he was "about to" call Public Works and rescind his acceptance, but before he could do so, he received the May 10 e-mail from the section manager, referred to in paragraph 31, "demanding" Petitioner's resignation.

59. Petitioner's July 10, 2005, memorandum stated that the only reason he submitted the resignation letter to Water Resource Services was because he had been previously told he was "insubordinate and facing charges," and he wanted to "avoid more consternation and strife and to not be insubordinate." According to the memorandum, Petitioner attempted to rescind his resignation letter the day after it was submitted, but the manager in Water Resource Services rejected Petitioner's attempt to rescind his resignation.

60. Notwithstanding Petitioner's July 10, 2006, memorandum stating that he was forced to resign, Petitioner's resignation was voluntary, and Water Resource Services was under no obligation to accept Petitioner's offer to rescind his resignation and to rehire him.

61. By letter dated July 14, 2006, Petitioner filed a complaint with the County administrator. The complaint challenged the Board's Final Summary Judgment affirming Petitioner's dismissal under the state's Whistle-blower Act.

62. The sole reason the County terminated Petitioner's employment was that he could not perform the functions of the transportation worker position in Public Works.

63. Civil Service Board Rule 11.2(27) provides that employees in classified service, such as Petitioner, may be dismissed if a demonstrated physical impairment prevents the employee from performing the essential functions of his position.

64. The evidence does not support Petitioner's claims that after he filed a Whistle-blower claim on April 17, 2005, he was forced to transfer to Public Works, and then was dismissed from that job.

CONCLUSIONS OF LAW

65. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this

proceeding. §§ 120.569, 120.57, 20.65(7) and 112.3187(8) Fla. Stat. (2006).[4/]

66. Petitioner claims that Hillsborough County took adverse action against him (i.e., dismissing him from the transportation worker position and/or not allowing him to return to a position in Water Resource Services) in retaliation for his disclosing information that a County employee was a sexual predator.

67. The statutory basis for Petitioner's position is Section 112.3187, Florida Statutes (2006), which is part of the Whistle-blower's Act. See § 112.3187(1), Fla. Stat. (2006).

68. Section 112.3187, Florida Statutes (2006), provides in relevant part, the following:

> (4) ACTIONS PROHIBITED.--
>
> (a) An agency or independent contractor shall not dismiss, discipline, or take any other adverse personnel action against an employee for disclosing information pursuant to the provisions of this section.
> (b) An agency or independent contractor shall not take any adverse action that affects the rights or interests of a person in retaliation for the person's disclosure of information under this section.
>
> * * *
>
> (5) NATURE OF INFORMATION DISCLOSED.--The information disclosed under this section must include:
>
> (a) Any violation or suspected violation of any federal, state, or local law, rule, or

regulation committed by an employee or agent of an agency or independent contractor which creates and presents a substantial and specific danger to the public's health, safety, or welfare.

(b) Any act or suspected act of gross mismanagement, malfeasance, misfeasance, gross waste of public funds, suspected or actual Medicaid fraud or abuse, or gross neglect of duty committed by an employee or agent of an agency or independent contractor.

(6) TO WHOM INFORMATION DISCLOSED.--

* * *

[F]or disclosures concerning a local governmental entity, including any regional, county, or municipal entity, special district, community college district, or school district or any political subdivision of any of the foregoing, the information must be disclosed to a chief executive officer as defined in s. 447.203(9) or other appropriate local official.

(7) EMPLOYEES AND PERSONS PROTECTED.--This section protects employees and persons who disclose information on their own initiative in a written and signed complaint. . . .

(8) REMEDIES.--

* * *

(b) Within 60 days after the action prohibited by this section, any local public employee protected by this section may file a complaint with the appropriate local governmental authority, if that authority has established by ordinance an administrative procedure for handling such complaints or has contracted with the Division of Administrative Hearings under s. 120.65 to conduct hearings under this

> section. The administrative procedure created by ordinance must provide for the complaint to be heard by a panel of impartial persons appointed by the appropriate local governmental authority. Upon hearing the complaint, the panel must make findings of fact and conclusions of law for a final decision by the local governmental authority. Within 180 days after entry of a final decision by the local governmental authority, the public employee who filed the complaint may bring a civil action in any court of competent jurisdiction. If the local governmental authority has not established an administrative procedure by ordinance or contract, a local public employee may, within 180 days after the action prohibited by this section, bring a civil action in a court of competent jurisdiction. For the purpose of this paragraph, the term "local governmental authority" includes any regional, county, or municipal entity, special district, community college district, or school district or any political subdivision of any of the foregoing.
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> * * *
>
> (10) DEFENSES.--It shall be an affirmative defense to any action brought pursuant to this section that the adverse action was predicated upon grounds other than, and would have been taken absent, the employee's or person's exercise of rights protected by this section.

69. For purposes of the Whistle-blower Act, Subsection 112.3187(3), Florida Statutes (2006), defines the following terms as follows:

> (a) "Agency" means any state, regional, county, local, or municipal government entity, whether executive, judicial, or

> legislative; any official, officer, department, division, bureau, commission, authority, or political subdivision therein; or any public school, community college, or state university.
>
> (b) "Employee" means a person who performs services for, and under the control and direction of, or contracts with, an agency or independent contractor for wages or other remuneration.
>
> (c) "Adverse personnel action" means the discharge, suspension, transfer, or demotion of any employee or the withholding of bonuses, the reduction in salary or benefits, or any other adverse action taken against an employee within the terms and conditions of employment by an agency or independent contractor.

70. Hillsborough County is an agency within the meaning of Subsection 112.3187(3)(a), Florida Statutes (2006).

71. Petitioner is an employee within the meaning of Subsection 112.3187(3)(b), Florida Statutes (2006).

72. Hillsborough County's dismissal of Petitioner from his position as a transportation worker in Public Works is an adverse personnel action within the meaning of Subsection 112.3187(3)(c), Florida Statutes (2006).

73. As a preliminary matter, an employee such as Petitioner, who alleges an adverse personnel action under the Whistle-blower Act, may file a written complaint with the County's chief executive officer, but must do so within 60 days after the adverse personnel action is taken by the agency.

See § 112.3187(6) and (8)(b), Fla. Stat. (2006). An almost identical provision is in Hillsborough County Board Policy Section 07.09.01.00.[5/]

74. The parties have taken different views on the following issues related to requirements for filing complaints: (1) whether the County administrator is the agency's chief executive officer for purpose of the Whistle-blower Act; and (2) when the time begins to run for purposes of calculating the 60 days.

75. As to the first preliminary issue, the evidence established that the County administrator is the chief executive officer of the County within the meaning of Subsection 447.203(9), Florida Statutes (2006).[6/] Therefore, disclosures covered by Subsection 112.3187(5), Florida Statutes (2006), must be made to the County administrator, as the chief executive officer. See § 112.3187(6), Fla. Stat. (2006). In this case, the evidence established that Petitioner properly filed the subject complaint with the County administrator.

76. The second issue, when the 60 days "after the action prohibited by this section [112.3187]" begin to run, determines whether Petitioner timely filed his Whistle-blower complaint or whether the complaint is time-barred.

77. The evidence established that Hillsborough County dismissed Petitioner from his position as transportation worker

on February 10, 2006. The evidence also established that Petitioner exercised his right to appeal his dismissal to the Board and that appeal, which affirmed the dismissal, was final on June 20, 2006. Finally, it is undisputed that Petitioner filed his complaint with the County administrator on July 14, 2006.

78. The County asserts that the 60 days began to run on or about February 10, 2005, the date the dismissal notice was issued. Based on this interpretation of Subsection 112.3187(8)(b), Florida Statutes (2006), and the related Hillsborough County Board Policy Section 07.09.01.00, Petitioner's complaint should have been filed on or about April 11, 2006. The County contends that since Petitioner did not file the complaint until July 14, 2006, the complaint is untimely and should be dismissed.

79. On the other hand, Petitioner's position seems to be that the 60-day time for filing a Whistle-blower complaint began to run on June 20, 2006, the date Petitioner's appeal of the dismissal was final. Under Petitioner's interpretation of Subsection 112.3187(8)(b), Florida Statutes (2006), and the related Hillsborough County Board Policy Section 07.09.01.00, Petitioner's complaint was timely, as it was filed about 24 days after the final decision on appeal.

80. A review of relevant cases provides guidance in determining the issue of whether the complaint in this case was timely filed.

81. The statute of limitations provision in Subsection 112.3187(8)(b), Florida Statutes (2006), has been construed liberally in favor of granting access to employees who "blow the whistle." Martin County v. Edenfield, 609 So. 2d 27, 29 (Fla. 1992).

82. The court in Harris v. District Board of Trustees of Polk Community College, 9 F. Supp. 2d 1319 (M.D. Fla. 1998), construed the statute of limitations in Subsection 112.3187(8)(b), Florida Statutes (2006), which provides that "within 180 days after entry of a final decision by the local governmental authority, the public employee may bring a civil action in any court of competent jurisdiction." The court summarizes its interpretation as follows:

> After a careful review of the statute and the aforementioned cases, this Court is convinced that the statute of limitations of Fl. St. § 112.3187(8)(b), when construed liberally in favor of granting plaintiff access to the remedy sought, accrues at the time the plaintiff has knowledge of the allegedly wrongful act.

9 F. Supp. 2d at 1328.

83. Pertinent to this case is the provision in Subsection 112.3187(8)(b), Florida Statutes (2006), that states "within 60

days after the action prohibited . . ., any local public employee may file a complaint with the appropriate local government authority." Applying the interpretation quoted in Harris, to a similar statute of limitations provision in that subsection relevant to this case, it is concluded that the 60-day time period begins to accrue on the day the affected local employee has knowledge of the wrongful act, or prohibited act (i.e., the adverse personnel action).

84. Based on the foregoing, Petitioner had 60 days from the date he had knowledge of the alleged adverse personnel action to file his complaint. Here, the evidence established that Petitioner noted on his appeal request filed on February 20, 2006, that he received the dismissal notice on February 13, 2006. Therefore, unlike the plaintiffs in Harris, 9 F. Supp. 2d at 1319, there is no question of fact as to when Petitioner had knowledge of his dismissal.

85. In light of Petitioner's failure to file the Whistle-blower complaint within 60 days of knowing of the County's adverse personnel action (i.e., his dismissal), his complaint is time-barred and should be dismissed.

86. Even if Petitioner had timely filed his complaint for the reasons below, he failed to meet the burden of proof necessary to establish a retaliation claim under Section 112.3187, Florida Statutes (2006), of the Whistle-blower Act.

87. To establish a prima facie case under Florida's Whistle-blower Act, the requisite elements set forth under a Title VII retaliation claim are applied. Those elements are as follows:

> [A] [petitioner] must show that (1) he engaged in statutorily protected expression; (2) he suffered an adverse employment action; and (3) there is some causal relation between the two events. . . Once the prima facie case is established, the employer must proffer a legitimate non-retaliatory reason for the adverse employment action. The [petitioner] bears the ultimate burden of proving by a preponderance of the evidence that the reason provided by the employer is a pretext for prohibited, retaliatory conduct.

Rice-Lamar v. City of Ft. Lauderdale, 853 So. 2d 1125, 1132-33 (Fla. 4th DCA 2003), citing Olmsted v. Taco Bell Corp., 141 F. 3d 1457, 1460 (11th Cir. 1998).

88. In order to establish a prima facie case of retaliation, Petitioner must prove all three elements described above.

89. It is undisputed that Hillsborough County dismissed Petitioner from his position as a transportation worker in Public Works. Moreover, this action constitutes adverse employment action within the meaning of Subsection 112.3187(3)(c), Florida Statutes (2006).

90. In addition to his dismissal, Petitioner contends that other adverse employment action was taken against him. He

argues, but provides no competent and substantial evidence that Water Resource Services demanded his resignation, forced him to take the job as a transportation worker, and then refused to rehire him after he resigned. Finally, Petitioner suggests that the County refused to hire him in any of the positions for which he applied after it was determined that he could not perform the job duties of the transportation worker. All of these claims are without merit and do not constitute adverse employment action by the County.

91. The evidence established that Petitioner's resignation was voluntary and was requested by Water Resource Services, after being notified that Petitioner had accepted a position in another department. Thus, it was Petitioner's acceptance of another position that required him to resign. While the evidence showed that Petitioner wanted to rescind his voluntary resignation and be rehired by Water Resource Services, that department declined to rehire him. However, the failure to rehire Petitioner or any employee who voluntarily resigns from a position is not an adverse employment action within the Whistle-blower Act. Finally, the County's failure to hire Petitioner for open positions for which he was not the most qualified candidate/applicant does not constitute an adverse employment action.

92. Petitioner failed to establish that the information he disclosed in the April 2005 e-mail to the County administrator, that a County employee was a sexual predator and was allowed to roam freely and unsupervised in a County vehicle, constituted protected expression or a disclosure under Subsection 112.3187(5), Florida Statutes (2006).

93. In order to be protected expression or a disclosure under the Whistle-blower Act, the information disclosed must be a violation or suspected violation of a federal, state, or local law, rule, or regulation committed by an employee or agent of the agency which creates and presents a substantial and specific danger to the public's health, safety, and welfare. See § 112.3187(5)(a), Fla. Stat. (2006). The information disclosed by Petitioner alleged no actual or suspected violation of any law or rule which presents a substantial and specific danger to the public's health, safety or welfare.

94. Assuming arguendo that the information disclosed constituted information protected under Subsection 112.3187(5), Florida Statutes (2006), Petitioner must still prove the third element required to establish a prima facie case. That element requires that Petitioner show that there was some causal relation between the disclosure and his dismissal, not merely that the two events occurred. Here, Petitioner failed to establish that there was a connection between these two events.

Rather, the evidence demonstrated that Petitioner was dismissed months after the disclosure and only after it was determined that he was unable to do the job of a transportation worker because of his physical limitations.

95. Petitioner established that the County took adverse employment action against him by dismissing him from his transportation worker position, but failed to establish the other two elements. He did not establish that the information disclosed came within the purview of Subsection 112.3187(5), Florida Statutes (2006), and that there was a causal connection between his dismissal and that information. Having failed to establish all three elements, Petitioner did not establish a prima facie case of retaliation under the Whistle-blower Act. Therefore, he did not meet his initial burden of proof.

96. In absence of Petitioner's establishing a prima facie case, the County did not need to proffer a legitimate non-retaliatory reason for the adverse employment action. Nonetheless, the County presented undisputed evidence that the sole reason Petitioner was dismissed from his position as a transportation worker was that due to a physical impairment, he could not perform the job duties. Furthermore, the evidence established that this was a basis for dismissal under the Civil Service Board Rule 11.2(27).

97. Again, assuming arguendo that Petitioner established a prima facie case of retaliation under Section 112.3187, Florida Statutes (2006), Petitioner failed to prove that the reason provided by Hillsborough County for dismissing him is a pretext for prohibited, retaliatory conduct.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Hillsborough County Board of County Commissioners enter a final order finding that Petitioner did not timely file his Whistle-blower complaint and dismissing the Petitioner's complaint.

DONE AND ENTERED this 11th day of April, 2007, in Tallahassee, Leon County, Florida.

S

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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of April, 2007.

ENDNOTES

[1/] Petitioner testified that he had two reasons for requesting a transfer from the Central Pump Station. The first reason relates to a telephone call that Petitioner made to the Central Pump Station. After the transfer was granted, Petitioner called a supervisor at the Central Pump Station and asked the supervisor if he (Petitioner) had to be immediately placed on the rotation for "on-call status" when he reported to work. According to Petitioner, the supervisor told him that he did not have time to talk to Petitioner and then hung up. Based on this brief telephone conversation, Petitioner "had a problem" with that supervisor and believed that the supervisor had "total hostility" toward him. The second reason Petitioner did not want to work at the Central Pump Station was that Mr. Dorsett worked at that location. Petitioner testified, "I wasn't going to work with him [Dorsett] because I didn't want to work with him, because I felt he shouldn't even be there."

[2/] This was in accordance with County policy and was necessary because since the effective day of his employment with Public Works, Petitioner was encumbering a transportation worker position, even though by his own admission and the County's determination, he was physically unable to perform the job duties.

[3/] Paragraph 11, under Undisputed Material Facts of Final Summary Judgment, Docket No. 06-575, dated June 20, 2006.

[4/] Hillsborough County Board Policy Section 07.09.01.00 requires the County administrator or designee to refer complaints under the State Whistle-blower Act to the DOAH.

[5/] Hillsborough County Board Policy Section 07.09.01.00 provides in pertinent part the following: "Any public employee . . . who alleges an adverse personnel action in violation of the State Whistle-blower Act may file a written complaint within sixty (60) days of the alleged violation with the Hillsborough County Administrator or designee."

[6/] Subsection 447.203(9), Florida Statutes (2006), states that a "'[c]hief executive officer', for the state shall mean the Governor and for other public employers shall mean the person, whether elected or appointed, who is responsible to the legislative body of the public employer for the administration of the governmental affairs of the public employer."

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.